83-716

No. A-208

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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

CAROLE JUNE CATON, Petitioner

v.

PAUL WILLIAM CATON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

Carole June Lawson
(Formerly Caton)*
Rt. 2, Box 85C
Haskell, Oklahoma 74436
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*Proceeding for herself

QUESTIONS PRESENTED

1. Whether the Oklahoma Court of Appeals may hold that it is acceptable for a male to use 10 O.S. §§ 501-508, providing for blood tests, to prove nonpaternity of a child while denying blood tests to a similarly situated female attempting to prove nonpaternity.

2. Whether petitioner has a right to be heard, through the vehicle of blood grouping tests, which could provide the only scientific and impartial evidence of the identity of the natural father of her minor child.

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No. A-208

CAROLE JUNE CATON, Petitioner

v.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

Carole June Lawson (formerly Caton), petitions for a writ of certiorari to the Oklahoma Supreme Court for the purpose of reviewing the judgment of the Oklahoma Court of Appeals.

OPINIONS BELOW

The opinion of the Oklahoma Court of Appeals, which was not for publication, is printed in Appendix A. The Journal Entry of the Supreme Court of Oklahoma denying certiorari is printed in Appendix B.

JURISDICTION

The judgment of the Oklahoma Court of Appeals was entered on March 15, 1983. A petition to the Oklahoma Court of Appeals for rehearing was denied on May 3, 1983. On June 28, 1983 the Oklahoma Supreme Court denied certiorari. On September 23, 1983 Associate Justice Byron White extended the time within which to file a petition for a writ of certiorari to Oct. 26, 1983. The Jurisdiction of this Court is invoked under 28 U.S.C. 1257 and any relevant statutes.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amend-

ment to the Constitution of the United States, which provides, in part, as follows:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Carole June Caton filed for divorce from Paul William Caton in the District Court of Tulsa County, Oklahoma. Carole Caton alleged that Paul Caton was not the father of her minor child (12 months), and requested blood grouping tests to establish this. The District Court ordered blood tests. Carole Caton and her minor child had blood grouping tests performed. Paul Caton refused to comply with two District Court orders requiring him to provide blood samples.

The District Court granted a divorce and found Paul Caton in willful contempt of court, but adjudicated that Paul Caton was the father of the minor child. The District Court took no action to enforce the blood grouping orders

against Paul Caton.

Carole Caton appealed to the Oklahoma Court of Appeals, Division no. 1, requesting that the District Court of Tulsa County be instructed to adjudicate the question of paternity against Paul Caton (In this case, this means adjudicating that he is not the father), or alternately, to enforce its blood grouping order against Paul Caton. The Oklahoma Court of Appeals denied the appeal on Feb. 8, 1983.

Carole Caton filed a petition for rehearing, which was granted. The Oklahoma Court of Appeals, Division 1, again denied the appeal, substituting a new opinion.

The Oklahoma Court of Appeals denied a second petition for rehearing on May 3, 1983.

On May 20, 1983, Carole Caton petitioned the Oklahoma Supreme Court for a writ of certiorari.

On June 28, 1983, the Supreme Court of Oklahoma denied certiorari, with six justices concurring and three dissenting.

REASONS FOR GRANTING THE PETITION

Oklahoma Statute 10 O.S. § 501 provides:

> "In a civil action or actions in the nature of a civil proceeding in which paternity is a relevant fact, the court *** upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall, order the mother, child, and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice are required."

The Act, on its face, applies to <u>any party</u>. There is nothing in the Act to support an interpretation that the Act applies only to men seeking to show nonpaternity, but not to women seeking to show nonpaternity.

The Oklahoma Court of Appeals held that it was "socially repugnant" for a woman to, in effect, illegitimize a child, by proving nonpaternity, and that the act was intended for use by men to avoid support payments. The use of the Act by a man would also illegitimize a child if nonpaternity were proven, and should be equally socially repug-

nant. However the Oklahoma Court of Appeals held that such use by a man was proper.

Petitioner claims that the use of Oklahoma Statute 10 O.S. § 501 by men, but the denial of its use by women constitutes impermissible, invidious discrimination solely on the basis of sex. The U.S. Supreme Court has held, in the cases of Reed vs. Reed, 404 U.S. 71 and Frontiero v. Richardson, 411 U.S. 677, that discrimination based upon sex constituted invidious discrimination and could not stand absent a compelling state reason. There is no compelling state reason which would authorize men to dispute the paternity of children born during wedlock, but not authorize women to dispute the paternity of the same child born during wedlock. The Court of Appeals erred in not ordering that the issue of paternity be resolved against the party refusing to provide the court-ordered blood sample, or by alternately instructing the trial court to enforce its blood grouping order.

The Fourteenth Amendment provides in part: "No State shall...deprive any person of life, liberty, or property, without due process of law...". The Supreme Court of the United States decided in Little vs. Streater, 452 U.S. 1, that the absence of blood grouping tests denied petitioner due process by denying him "...a meaningful opportunity to be heard". While the reasons for denial of petitioner's opportunity to be heard by presenting blood grouping evidence are different from the reasons in Little vs. Streater, they are no less a denial of due process. The decision in Little vs. Streater referred to Mathews vs. Eldridge, 424 US 319, in setting three standards for a due process claim. Under the first standard a significant private interest must be affected. In this case it is petitioner's interest of having the filiation of her child correctly ascribed to her present husband, rather than to her former husband, who refuses to allow filiation to be determined by the blood grouping tests twice or-

dered by the trial court. Petitioner and her present husband have already been heard, by submitting to blood grouping tests and obtaining expert opinion ascribing a 96.7% probability of paternity to her present husband. The second standard is consideration of the risk of erroneous deprivation of such private interest through the procedures used. The use of a presumption of legitimacy causes great risk of error. This risk of error could be made almost nil by the scientific blood grouping tests ordered by the trial court, but refused by the respondent, Paul Caton. The third standard is consideration of the Government's interest "including...the fiscal and administrative burdens". The State of Oklahoma has not been asked to pay for blood grouping tests, nor to take on substantial administrative burdens if they are performed. The sole possible state interest is the social interest of not illegitimizing the child. In this case there is no possibility of illegitimizing the child. Peti-

tioner's present husband has testified that he is the father of the minor child and accepts her as his daughter, this in addition to the 96.7% probability of paternity scientifically ascribed to him by blood grouping tests. It would be simple for the trial court to declare petitioner's present husband the legal father. In this way the child would not be illegitimized, rather she would be correctly legitimized to her natural father.

CONCLUSION

I, Carole June Lawson (formerly Caton), respectfully request that the United States Supreme Court grant this petition for writ of certiorari, and reverse the decision of the Oklahoma Court of Appeals, by directing that Paul William Caton be judged not to be the natural father of my minor child, or by directing that the trial court enforce its orders requiring Paul William Caton to provide samples of his blood.

Respectfully submitted,

Carole June Lawson

CAROLE JUNE LAWSON (formerly Caton)

I certify that a copy was sent to:

Mr. Gomer A. Evans, Jr. and
Mr. Bruce Sewell
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Carole June Lawson

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TABLE OF CASES

Reed vs. Reed, 404 US 71, 30 L Ed 2d 225, 92 S Ct 251.

Frontiero vs. Richardson, 411 US 677, 36 L Ed 2d 583, 93 S Ct 1764.

Little vs. Streater, 452 US 1, 68 L Ed 2d 627, 101 S Ct 2202.

Mathews vs. Eldridge, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893.

CONSTITUTION

Amendment XIV - Certified true copy published in USCA.

STATUTES

28 U.S.C. 1257

APPENDIX A

NOT FOR PUBLICATION

THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

(Division No. 1)

CAROLE JUNE CATON, Appellant,	)	
vs.	)	No. 57,002
PAUL WILLIAM CATON, Appellee.	)	

APPEAL FROM THE DISTRICT COURT OF

TULSA COUNTY, OKLAHOMA

HONORABLE BERT C. McELROY, JUDGE

A F F I R M E D

Bruce M. Townsend
Tulsa, Oklahoma, For Appellant,

Gomer A. Evans, Jr.
G. Bruce Sewell
Tulsa, Oklahoma, For Appellee.

Opinion by LESTER A. REYNOLDS, Presiding Judge:

Carole June Caton (Appellant) contends that the trial court erred in failing to im-

pose sanctions against Paul William Caton (Appellee) for contempt of court. Appellant also alleges that the amount of child support awarded is inadequate and clearly against the weight of the evidence. Appellant further asserts that it was error to deny her alimony.

Appellant and Appellee were granted a divorce on the grounds of mutual and irreconcilable incompatibility on February 18, 1981. Appellant filed her initial petition for divorce on January 3, 1980. Temporary custody of the child of the marriage, Adrianna Vashti Caton, was granted to Appellant. Permanent custody, questions about the child's paternity, alimony, and property division were reserved for further hearing. The division of property has not been appealed.

Appellant alleged that the child, born December 26, 1978, was not fathered by Appellee. The trial court granted Appellant's motion for blood tests of Appellee pursuant to 10 O.S. 1981 § 501, which provides:

> In a civil action or actions in the

> nature of a civil proceedings in which paternity is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall, order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require. (Emphasis added.)

Appellee has consistently failed and refused to submit to blood tests. He contends that it would be repugnant to the policy of Oklahoma and to social conscience to allow Appellant to use 10 O.S. 1981 § 501 to illegitimize their daughter. We agree. He does not deny paternity of the child.

The trial court held hearings several times on Appellant's motions to hold Appellee in contempt for refusing to submit to blood tests. The record reveals that the trial court declined to cite Appellee for contempt on at least two occasions. The trial court ultimately found that Appellee was in indirect contempt of court, but found that the

interests of justice did not require that he be punished.

Appellant contends that the trial court erred in not punishing Appellant[1] for contempt of court.

A primary objective in construing any statute is to ascertain the intent of the Legislature. Midwest City v. Harris, 561 P. 2d 1357 (Okl. 1977). Statutes must be construed to render a reasonable result and to promote the general purposes for which they were enacted. AMF Tubescope Company v. Hatchel, 547 P.2d 374 (Okl. 1974).

The presumption that a child born during marriage is legitimate is longstanding, and may be rebutted only by clear, conclusive, and convincing evidence. Frankovich v. Frankovich, 459 P.2d 583 (Okl. 1969); Bell v. Territory, 56 P. 853 (Okl. 1899). This presumption reflects a strong public policy of Oklahoma.

In matters of equitable cognizance such as the case at hand, this Court will not re-

1 sic

verse the trial court's determination unless it is clearly against the weight of the evidence or established principles of equity. Nisbet v. Midwest Oil Corporation, 451 P.2d 687 (Okl. 1968).

One purpose of suits to determine paternity is to allow accused men an opportunity to present evidence of non-paternity so they may avoid having to pay support for children they have not fathered. Another purpose is to obtain support for minor children from their natural parents. Appellee does not deny that he is the father of the child in this action. He does not seek to avoid his financial responsibility to his daughter. Appellant's contention that Appellee did not have marital relations with her during the time of conception does not clearly and conclusively rebutt Appellee's testimony that the parties did engage in marital relations. The trial court's finding that Appellee is the father of the child born to Appellant is not clearly against the weight of the evidence nor is it contrary

to established principles of equity.

The trial court had the discretion under 10 O.S. 1981 § 501 not to enforce its order for blood tests if the interests of justice did not so require. Appellant has demonstrated no abuse of that discretion nor has she shown that the trial court's holding is contrary to the intended operation of 10 O.S. 1981 § 501.

Appellant's contention that the award of $100.00 per month as child support is woefully inadequate is unsupported by the record. This Court will search the entire record, but will not disturb the amount of child support allowed by the trial court unless the amount awarded is clearly against the weight of the evidence. Kirkland v. Kirkland, 488 P.2d 1222 (Okl. 1971). The only evidence regarding Adrianna's expenses was that Appellant and the child incurred approximately $560.00 per month in expenses. Appellant stated that she had no budget for the child's separate expenses. If it is assumed that the child's expenses are half of the monthly total, one must

then subtract the support which Appellant herself owes the child. When so viewed, the award of $100.00 per month is not clearly against the weight of the evidence.

The determination of an alimony award is a matter addressed to the sound discretion of the trial court. The discretion must be reasonably exercised based upon what is fair and just in light of all the circumstances surrounding the case. Peters v. Peters, 539 P. 2d 26 (Okl. 1975). Appellant has a bachelor's degree in journalism from the University of Tulsa. She was employed prior to her marriage to Appellee. Appellant presented no medical evidence showing an inability to resume gainful employment. No abuse of discretion has been shown.

Attorney's fees for this appeal should be borne by the individual parties.

AFFIRMED.

ROBINSON, J. and YOUNG, J. concur.

APPENDIX B

IN THE SUPREME COURT OF THE

STATE OF OKLAHOMA

Tuesday, June 28, 1983

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

57,002 Carole June Caton v. Paul William Caton.
Certiorari denied.
CONCUR: Barnes, C.J., Simms, V.C.J., Irwin, Hodges, Doolin, Hargrave, JJ.
DISSENT: Lavender, Opala, Wilson, JJ.

Page signed by Don Barnes,
CHIEF JUSTICE

83-716

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vs.

PAUL WILLIAM CATON, Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENT IN OPPOSITION

Thomas Dee Frasier
James E. Frasier

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

No. A-208

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vs.

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ON WRIT OF CERTIORARI TO THE
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BRIEF OF RESPONDENT IN OPPOSITION

LIST OF PARTIES

Pursuant to Rule 34.1(b), Rules of the Supreme Court of the United States (1980), requiring the listing of all parties to the proceeding in the court whose

judgment is sought to be reviewed, Respondent would respectfully state to the Court that the minor daughter, Adrianna Caton, is a party in interest to these proceedings and that an attorney has been appointed by the District Court of Tulsa County to represent her.

Petitioner, furthermore, has failed to comply with Rule 28.4(c) which requires that "(i)n any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U.S.C. §2403(b) may be applicable and shall be served upon the Attorney General of the

State". The purpose of this provision, of course, is to allow the state whose statute is being questioned to have an opportunity to defend its constitutionality. "The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality." 28 U.S.C. §2403(b)

STATEMENT OF JURISDICTION

At the outset, it must be questioned whether this Court has jurisdiction to review the case of Caton v. Caton. Petitioner (Pet. for Cert. 2) invokes the authority of 28 U.S.C. 1257 which pro-

vides that final judgments of the highest court of a State may be reviewed by the Supreme Court by Writ of Certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution ... " Rule 21.1(h), however, requires the Petitioner to

> "specify the state in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof ... as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

Although Petitioner recites the stages of proceedings below (Pet. for Cert. p.3-4), she has completely failed to indicate when and how the federal questions she would have the Court consider were raised in the state courts. Issues presented on appeal to the Supreme Court of Oklahoma, like those considered by the trial court, were exclusively concerned with the interpretation of Oklahoma Statutes and case law and the application of state law to the facts of this case. No constitutional questions of any kind, state or federal, were presented. In accord with Oklahoma practice, 20 Okla. Stat. §30.1 (1981), the case was assigned by the Supreme Court to the Court of Appeals which issued an opinion

affirming the trial court's ruling, based in part on a misconception of the facts.

She then petitioned the Court of Appeals for a rehearing, again raising pure questions of statutory construction. The rehearing was granted, and resulted again in affirmance, albeit with a new opinion addressing the question of the child's legitimacy. No mention of any kind was made of the applicability of the Statute with respect to gender of the parent.

Once again she petitioned for a rehearing, now for the first time, however, raising the issue of equal protection. This allegation, based as it was on a forced reading of the Court's decision,

as will be discussed more fully below, was apparently rejected by the Court of Appeals out of hand in refusing to grant a second rehearing. In no way did the Court indicate that it agreed with Petitioner's characterization of the ruling as discriminatory, let alone pass on the constitutionality of the purported policy. Her Petition to the Supreme Court for a Writ of Certiorari, in which she again raised this spurious issue of discrimination, was similarly denied. Thus it is obvious that at no time did a state court even consider, let alone uphold, the constitutionality of the statute in question from attack on the basis of supposed sex discrimination.

> This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary". Webb v. Webb, 451 U.S. 493, 496, 101 S.Ct. 1889, 1891, 68 L.Ed.2d 392 (1981), quoting Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572 (1969).

That being the case, there would not appear to be any basis for review by this Court.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. 451 U.S. at 496-97, 101 S.Ct. at 1892.

The Court has recently reiterated that "it is only in exceptional cases,

and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below ..." Illinois v. Gates, ____ U.S. ___, 103 S.Ct. 2317, 2321 (1983), quoting McGoldrick v. Compagnie Generale, 309 U.S. 430, 435-36, 60 S.Ct. 670, 673, 84 L.Ed. 849 (1940). Cf. Tacon v. Arizona, 410 U.S. 350, 353, 93 S.Ct. 998, 999 (1973), ("We cannot decide issues raised for the first time here."); Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971) ("We emphasize that the federal claim must be fairly presented to the state courts."); Cardinale v. Louisiana, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398 (1969) ("It

was very early established that the Court will decide federal constitutional issues raised here for the first time on review of state court decisions.")

While it may be true that Petitioner did belatedly attempt to raise the issue of Equal Protection in her petition for rehearing addressed to the Court of Appeals, such was unavailing. "The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." Herndon v. State of Georgia, 295 U.S. 441, 443, 55 S.Ct. 794, 795, 79 L.Ed. 1530 (1934). See C. Wright, Federal Courts 541-542 (3d d. 1976). Cf., State

of Missouri v. Gehner, 281 U.S. 313, 320 520 S.Ct. 326, 327 (1930) ("Ordinarily, it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more."); Forbes v. State Council, 216 U.S. 396, 397, 30 S.Ct. 295, 296 (1910) ("it must appear that such Federal question was in fact passed upon in considering the motion for rehearing; if not, the general rule applies.") To be sure, an exception to the general rule exists "if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." 295 U.S. at 444, 55 S.Ct. at 795. It can hardly be said, however, to have been

unanticipated that the Court would consider it "repugnant to the policy of Oklahoma and to social conscience to allow Appellant to use 10 O.S. 1981 §501 to illegitimize their daughter". (Pet. for Cert. 14) in view of the strong and long-standing public policy of Oklahoma that "a child born during marriage is legitimate ... " (Id at 15). Petitioner has mysteriously read into this an intent to discriminate against women "similarly situated", which fantasy could just as well have been entertained in anticipation of the ruling. Petitioner's second question presented, i.e., whether she has been denied due process was not raised, even remotely, at any stage of the proceedings including her second petition for rehear-

ing and her Petition for a Writ of Certiorari.

Although the issues of Equal Protection and Due Process, which the states are bound to respect, are important guarantees under our Constitution, the nature of the federal union and the proper role of the courts counsels caution in the review of state decisions. "Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law ... " Webb v. Webb, 451 U.S. at 500, 101 S.Ct. at 1983.

> Apart from the reluctance with which every court should proceed to set aside legislation as uncon-

> stitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. Illinois v. Gates, ____ U.S. at ___ _, 103 S.Ct. at 2322.

It is for that reason that the Court "should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below". 451 U.S. at 500, 101 S.Ct. at 1893. Such is not the case here. Although the record below is not devoid of references to one of the issues Petitioner would raise before this Court, that of equal protection, "when the state

court whose judgment is being reviewed has not addressed the federal question that is later presented here," the Court cannot be sufficiently sure "that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court." Id. at 502, 101 S.Ct. at 1894. It is respectfully submitted that no such confidence is possible in the case Petitioner would present and that accordingly the Court should decline to assert jurisdiction.

STATEMENT OF THE CASE

Petitioner, Carole June Lawson (formerly Caton) and Respondent, Paul William Caton, were married in December 1974. A child, Adrianna Vashti Caton, was born

four years later, in December, 1978. Petitioner led Respondent to believe that Adrianna was his daughter. As a result a strong bond of love and affection developed between the two. One year later, however, in January, 1980, Petitioner filed for divorce and shortly thereafter applied to the court for an order requiring Respondent to undergo blood tests, alleging that "Plaintiff knows that Defendant is not the natural father of said child, that blood tests will exclude Defendant from the possibility of being the natural father of said child ... " The court, pursuant to 10 Okla. Stat. §501 (1981), ordered the Respondent to undergo such tests. Respondent, however, refused to do so due to his belief that

it was "vulgar" to undermine family ties with blood tests. The court found that it was not in the interests of justice to hold him in contempt. A second order was subsequently issued and Respondent was held in indirect contempt. The trial court, however, declined either to enforce the order or to resolve the issue of paternity against him. Since Oklahoma law presumes that a child born during a marriage is legitimate, a presumption which can only be overcome with clear and convincing evidence, and since absent Respondent's blood tests Petitioner could not meet her burden of proof, Respondent was adjudged to be the father and visitation rights were granted and child support awarded accordingly. After failing

in her attempt to obtain a writ of mandamus from the Oklahoma Supreme Court ordering the trial court to enforce its orders on blood testing, Petitioner began the appeal process which has culminated in her Petition for a Writ of Certiorari in this Court.

Respondent does not deny paternity. On the contrary, he is desirous of maintaining the close ties of filiation which have extended now over a period of some five years. Furthermore, he is able and willing to pay the child support awarded. No purpose would be served by a finding of nonpaternity on Respondent's part other than to extinguish the close personal ties he has enjoyed with the child. A psychologist in the case has testified

that the child needs to have a continuing relationship with the Respondent, whom she has known as her father since birth and that to sever this bond would be traumatizing for the child.

Petitioner is now married to James Lawson, her former paramour, whom she alleges to be the natural father of the child. At the time the adulterous affair was in progress, Respondent considered James Lawson to be his best friend. The effect of declaring Respondent not to be the father of the minor child would, accordingly, be to stimatize the child, Adrianna, as the adulterous offspring of her mother's illicit affair with her step-father. The child would lose one father without gaining another. No loss of

custody by the mother or of contact with the stepfather, of course, is at issue.

It is the contention of the Respondent, as it was the ruling of all the courts in Oklahoma which considered the case, that it would not be in the best interests of the child to pursue the issue of biological paternity any further. It is this posture of repose which Petitioner would have the Court disturb.

SUMMARY OF THE ARGUMENT

This case is of interest only to the parties and is too unique to establish any general rules of law. The applicable statute is not facially discriminatory and the construction placed on it by the court below makes no statement about

gender. The court held only that the legislature had not intended the statute to be used to illegitimize a child born to a marriage.

The Equal Protection clause requires only an important state interest, not a compelling one, where gender is concerned. Men and women can hardly be similarly situated with respect to paternity in any event. Petitioner has no liberty or property interest to protect in the determination that Respondent is not the father of her child and has had all the process she is due. It is Respondent who has a strong liberty interest in the child he has loved as a daughter. The presumption that a child born during a marriage is legitimate serves to protect him in

his interests as well as preventing the child from being stigmatized as the product of an illicit relationship.

ARGUMENT

POINT ONE:

THIS IS NOT AN APPROPRIATE CASE FOR CERTIORARI.

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Rule 17.1. There are no special and important reasons for the Court to hear this case. It has been amply considered and fairly decided in the courts below. It does not resemble the criteria listed in Rule 17.1 as exemplary of cases meriting consideration.

As was pointed out in Statement of Jurisdiction, the state court of last resort in Oklahoma has not, in fact, decided any federal question at all in this case, let alone one in conflict with the decision of the high court of another state or of this court. This case is not one of public importance but is purely of interest to the parties. NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951). It is at most of purely scholarly interest beyond benefiting the litigants. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). It unncessarily raises constitutional issues which would best be avoided. Id.

In her initial Motion for Order Requiring Blood Tests, Petitioner stated frankly that she was "fully aware of the unique fact status involved in this case which is believed to be a case of first impression. The fact situation is one in which the natural mother seeks to have the husband found to be not the natural father of the child." Accordingly, no useful purpose would be served if the Court were to grant Petitioner's request. She has had her day in court and has lost as she deserves. Unhappily, having exhausted her remedies in Oklahoma, she seeks now to exhibit the spectacle of her sordid misconduct before the nation's highest court solely to deprive a young child of the love and affection of the

man she knows as her father. Clearly, this is not a case warranting the exercise of the Court's extraordinary and discretionary jurisdiction.

POINT TWO:

PETITIONER HAS NOT BEEN DENIED THE EQUAL PROTECTIONS OF THE LAW.

Petitioner, a former newspaper reporter proceeding pro se, has seriously misconstrued the teachings of this court on Equal Protection. She concedes (Pet. for Cert. 5) that the Statute in question, 10 Okla. Stat. § 501, "applies to any party." (emphasis in original) Accordingly, it is not discriminatory on its face, either with respect to gender or to any other classification.

If a Statute is facially nondiscriminatory it may be possible to demonstrate a pattern of discriminatory enforcement from which a discriminatory intent may be inferred. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). The Court can readily appreciate, however, the difficulty Petitioner wil have in proving a pattern of discrimination on the basis of one admittedly unique case. Even where a neutral law has a disproportionate impact, more is needed to demonstrate a discriminatory purpose. Personnel Administrator of Mass v. Feeney, 442 U.S. 256, 261, 99 S.Ct. 2282, 2286, 60 L.Ed.2d 870 (1979), citing Washington v. Davis, 426 U.S. 229, 2380-44, 99 S.Ct. 2040, 2046-50, 48 L.Ed.2d 597.

Petitioner, apparently, would find the discriminatory intent in the interpretative gloss put on the Statute by the Court of Appeals. A fair reading of the decision will not sustain this contention. The court agreed with Respondent that "it would be repugnant to the policy of Oklahoma and to social conscience to allow Appellant to use 10 O.S. 1981 § 501 to illegitimize their daughter." (Pet. for Cert. 14) (emphasis added). The Court spoke only to the issue of one particular man in one particular case; it made no generalization on gender. On the contrary, the Court indicated that the presumption of legitimacy "reflects a strong public policy of Oklahoma." (Id. at 15) Obviously, this policy would just

as much be frustrated by a husband proving his own nonpaternity as by the wife, as here, attempting to do so. The Court gave absolutely no indication whatsoever that it would view the matter differently were the husband the instigator. Granted, the Court, in determing the intent of the legislature, spoke of allowing "accused men an opportunity to present evidence of non-paternity so they may avoid having to pay support for children they have not fathered." (Id. at 16) It went on to say, however, that another purpose "is to obtain support for minor children from their natural parents." Ordinarily, this will work to the benefit of the mother. Hence the two balance out.

Of course, in the vast majority of cases the child is born out of wedlock. The effect of proving nonpaternity will not be to "illegitimize" the child since it is already illegitimate. A child is illegitimized by proof of nonpaternity only in the rare case that a man choses to acknowledge a child allegedly born of an adulterous relationship by an unfaithful wife. Yet Petitioner maintains that "(t)he use of the Act by a man would also illegitimize a child if nonpaternity were proven, and should be equally socially repugnant. However, the Oklahoma Court of Appeals held that such use by a man was proper." (Pet. for Cert. 6) It held, of course, no such thing.

Even if the Court of Appeals had held that men could illegitimize and women not, Petitioner would not have carried her burden of proof. She labors under the misapprehension that Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) and Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) stand for the proposition "that discrimination based upon sex constituted invidious discrimination and could not stand absent a compelling state reason." (Pet. for Cert. 6) (emphasis added) As is well known, Reed was decided under a minimum scrutiny rationale, albeit somewhat heightened. In Frontiero a plurality did hold that classifications based upon sex are inherently suspect and thus

must be subjected to strict judicial scrutiny, which would, of course, require the elusive "compelling" state interest. This view has never been endorsed by the majority and is not the standard of review currently in force.

The definitive standard finally endorsed by the Court was set forth in the leading case of Craig v. Boren, 429 U.S. 190, 198, 97 S.Ct. 451, 457, 50 L.Ed. 2d 397 (1976). "To withstand constitutional challenge ... classifications by gender must serve important governmental objections and must be substantially related to achievement of those objectives." (emphasis added) In contrast to the "compelling" interests standard, under which defeat of the classification is

virtually a foregone conclusion, government interests which are merely "important" can more easily be shown to justify the challenged legislation.

Cases since Craig v. Boren have demonstrated the flexibility of this standard. Laws have been struck down as violative of equal protection in Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed. 2d 306 (1970) (alimony payments); Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1970) (adoption of unwed children); Califano v. Westcott, 443 U.S. 76, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979) (unemployment of mothers); Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980) (widower benefits); Kirchberg v.

Feenstra, 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981) (control of property); Mississippi University for Women v. Hogan, _____ U.S. _____ 102 S.Ct. 3331 (1983) (admittance policies). By contrast, laws have been upheld against charges of gender discrimination in Califano v. Webster, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977) (old-age insurance); Personnel Administrator of Mass., 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed. 2d 870 (1979) (veteran's preference); Rostker v. Goldberg, 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981) (draft registration); Lehr v. Robertson, _____ U.S. ____ , 103 S.Ct. 2985 (1983) (adoption of unwed children).

This brings us to the strange notion that the Oklahoma statute discriminates between a male attempting to prove non-paternity by means of blood tests, "while denying blood tests to a similarly situated female attempting to prove nonpaternity". (Pet. for Cert., Questions Presented) Granted, the relationship between a man and his paternity, may be similar to that between a woman and her maternity. Also, a man may be similarly situated with respect to a woman's maternity, as the latter is to be the former's paternity, by way of reciprocal analogy. Petitioner's contention, however, that a woman can be similarly situated to a man's paternity, or lack thereof, as he is himself is virtually self-satirical in

its absurdity. There is obviously no comparison between a man's nonpaternity. Just how different the situation is can be seen by analyzing Petitioner's claim that she has been denied due process.

POINT THREE:

PETITIONER HAS NOT BEEN DENIED DUE PROCESS OF LAW

Petitioner invites our attention to the case of Little v. Streater, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981) (Pet. for Cert. 7). In that case the Court held that it was unconstitutional to require an indigent male to pay for blood test to prove he was not the father of the child. Following Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903 47 L.Ed.2d 18 (1976), the Court noted that the putative father's private

interests were substantial. There was first of all the property interest which the defendant had at stake in terms of the claim for child support. Id. at 14, 101, S.Ct. at 2209. Second, there was his liberty interest in not being incarcerated for noncompliance. Id. What, by contrast, does Petitioner allege as her "private interest"? It is, so she tells us, "having the filiation of her child correctly ascribed to her present husband, rather than to her former husband ... " (Pet. for Cert. 7) She cites no authority for this remarkable proposition. How is she adversely affected by the false ascription of paternity? She will not have to pay undeserved child support if she fails to prove not her

own, but her former husband's nonpaternity. On the contrary, she has an interest in continuing those payments. Nor will she go to jail for nonpayment. No liberty interest there, either. True, Little does speak of a liberty interest in the absence of a parent-child relationship, but that is an interest unique to the male seeking to avoid "familial bonds" being imposed upon himself, id., not an interest in extinguishing those bonds which others freely embrace, as Petitioner is attempting to do. Conceivably the child's stepfather, if he is in fact the natural father, might have some interest in exercising exclusive paternity, but then Petitioner would have no standing to assert her husband's claim.

On the other hand, the Respondent has a very compelling liberty interest in maintaining the relationship which the Petitioner herself was responsible for allowing to develop. A man, after all, has a perfect right to expect that the child born to his wife will be his own.

The Court "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment", Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40, 94 S.Ct. 796, 39 L.Ed.2d 52 (1974), and that "the relationship between parent and child is constitutionally protected". Quilloin v. Walcott, 434 U.S. 246, 255-56, 98 S.Ct.

549, 554, 54 L.Ed.2d 511 (1978). "(T)he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children as well as from the fact of blood relationship". Lehr v. Robertson, _____ U.S. _____, 103 S.Ct. 2985 (1983), (quoting Smith v. Organization of Foster Families, 431 U.S. 816, 844, 97 S.Ct. 2094, 2109-2110, 53 L.Ed.2d 14 (1977) and Wisconsin v. Yoder, 406 U.S. 205, 231-33, 92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15 (1972). Clearly, then, Respondent has a constitutionally protected liberty right

in the "emotional attachments" he has, entirely through the actions of Petitioner, developed toward the minor child, quite aside from any "blood relationship".

The effect of enforcing the order for blood tests, if nonpaternity is proven, would be the same as extinguishing the rights of a natural parent who is judged unfit. "It is hardly surprising that this forced dissolution of the parent-child relationship has been recognized as a punitive sanction by courts, Congress, and commentators." Lassiter v. Department of Social Services, 452 U.S. 1839-40, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (dissenting). "Before a State may sever completely and irrevocably the rights of

parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence". Santosky v. Kramer, ___ U.S. ____, 102 S.Ct. 1388, 1391 (1982) The same logic should hold where the rights of a parent are severed upon the allegation that he is not the natural parent. The presumption which Petitioner complains of (Pet. for Cert. 8) does no more than protect the Respondent's right to his child. It is he who should be heard to complain of a lack of due process.

Petitioner has already had all the process she was due. She requested that the Court order Respondent to take the blood tests, and he refused. She hardly

has standing to demand that he be punished for contempt since she has no private stake in his incarceration. R.S. v. D., 410 U.S. 614, 618, 93 S.Ct. 1146, 1149, 35 L.Ed.2d 536 (1973). She cites no authority to the effect that a private litigant is entitled to a default judgment as a matter of law, even if the Oklahoma Statute made that option available to the trial court. 10 Okla. Stat. § 501 (1981) She says only that "(i)t would be simple for the trial court to declare petitioner's present husband the legal father". (Pet. for Cert. 9) She does not explain how the Due Process can be read to mandate such simplicity.

Finally, we may consider Petitioner's statement that, by attributing paternity

to her present husband (id) "the child would not be illegitimized, rather she would be correctly legitimized to her natural father". She was not so concerned with legitimacy, however, as to refrain from her nonpaternity action until after her divorce was granted and she had remarried. Even if she were now to take the name of her present stepfather, she would be branded before the world as the bastard daughter of an adultress, and deprived of the love and companionship of a father as well. It is respectfully submitted that nothing in the Due Process clause of the Constitution requires so inequitable a result.

CONCLUSION

The Respondent, Paul William Caton, requests that this Court deny the Petition for Writ of Certiorari and let stand the decision in the Court of Appeals below on the grounds that nothing in the laws of Oklahoma bearing on this case violates any clause of the Constitution of the United States.

Respectfully submitted,

Thomas Dee Frazier

I hereby certify that on the 25th day November 1983 three copies of the foregoing instrument was mailed to Carol June Lawson Route 2, Box 85c Haskell, Okla. 74436

Thomas Dee Frazier

CERTIFICATE OF SERVICE

I, the undersigned, Thomas Dee Frasier, of lawful age being first duly sworn, upon my oath state: That 40 copies of the above and foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari were duly deposited in the United States mail, first class postage prepaid, at Tulsa, Oklahoma, this 25th day of Nov. 1983, and within the time allowed for filing and pursuant to Rule 28 of the Rules of the Supreme Court properly addressed as follows:

Clerk of the Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Respectfully submitted,
FRASIER, FRASIER & GULLEKSON

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Office-Supreme Court, U.S.
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CLERK

No. 83-716

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

CAROLE JUNE CATON, Petitioner

v.

PAUL WILLIAM CATON, Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OKLAHOMA

PETITIONER'S REPLY BRIEF

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ON WRIT OF CERTIORARI TO THE
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PETITIONER'S REPLY BRIEF

1. Respondent makes repeated emotive appeals for this court to preserve the "close ties of filiation which have extended now over a period of some five years" (Br. in Opp. p. 18). This court should be informed that petitioner is proceeding against respondent in District Court because of respondent's sexual abuse of the minor child during court ordered visitation. Clinical social worker C. P. Gagliano, ACSW, reported "It is my professional opinion that Adrianna experienced sexually abusive acts upon her person by Paul Caton.'''I do not recommend that this four-year old child be permitted to

experience further trauma and fears apparently perpetrated and aroused by Paul. It is also my recommendation that visitation with Mr. Paul Caton be terminated." (Petitioner's Exhibit A). Clinical psychologist Dr. Paul J. Schwartz, Ph.D., reported "'''continuation of this visitation suggests the child is at continued risk for sexual abuse as defined and discussed in the previous section." (Petitioner's Exhibit B).

Petitioner respectfully asks this court to examine Petitioner's Exhibits A, B, and C.

2. Petitioner has never accepted the $100/month court ordered child support. She has petitioned the Tulsa District Court to revoke the support order. She has no "interest in continuing these payments" (Br. in Opp. p. 37).

3. Some, perhaps many, married men have fathered children by women other than their wives. Does a woman have the right to expect that a child born to her husband will be hers even if another woman is the biological parent? Respondent states that "A man, after all, has a perfect right to expect that the child born

to his wife will be his own." (Br. in Opp. p. 38). Petitioner suggests that a spouse does not have the right to expect that a child born to their spouse and a biological parent outside the marriage will be their own.

4. Respondent claims petitioner has no standing to demand that respondent be punished, since she has no private stake in respondent's incarceration (Br. in Opp. p. 42). Petitioner has never demanded that respondent be incarcerated for his contempt. Petitioner would prefer that respondent either be adjudicated not the father of her minor child, or that he willingly comply with the court order requiring blood tests.

5. An attorney was appointed to represent the child, but he acted only temporarily at the District Court.

Petitioner was not required by Rule 28.4 (c) to serve her petition on the Attorney General of Oklahoma, because she is not claiming that an Oklahoma statute is unconstitutional.

She claims that Oklahoma statutes were applied in such a way as to violate her rights granted by the United States Constitution.

6. Respondent's claim that this case is of "purely scholarly interest beyond benefiting the litigants" (Br. in Opp. p. 23) is incorrect. The circumstances are not unique or even rare. Dr. Jeffrey W. Morris, M.D., Ph.D., of the Memorial Medical Center of Long Beach, estimates that one percent of the 3,000 paternity cases tested in his laboratory involved a wife alleging that her husband was not the father of her child (Petitioner's Exhibit D). The annual caseload of all paternity blood tests is now 40,000 according to Dr. Morris. This translates into 400 cases per year with circumstances very similar to this case. Dr. Morris estimates that an additional four percent of his cases involve the husband claiming nonpaternity of a child born to his wife.

The question of whether blood tests should be mandatory upon the parties involved is far from academic. Many lower courts have

ruled that the trial court must order blood tests, for example State vs. Meacham, 93 Wash, 2d 738, 612 P. 2d 795 (1980). The Oklahoma Supreme Court in State ex rel. Evertson vs. Cornett (391 P. 2d 277 (Okla. 1964)) ruled that the trial court must order blood tests, because they offered the defendant his only chance to prove nonpaternity. The rulings to date have required trial courts to order tests, to which the parties have almost invariably submitted. If parties become aware that they may refuse court-ordered blood tests without penalty, as Mr. Caton did, parentage laws of many states will become ineffective. The United States Supreme Court has said that proof of paternity "is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses" (Mills v. Habluetzel, 102 S. Ct. 1549 (1982)). This Court should see that paternity is determined by biological facts and not conflicting testimony, by not allowing contempt such as that shown by Mr. Caton.

7. On Oct. 24, 1983, respondent filed a motion with the Tulsa District Court, asking that absolute custody of the child be transferred to respondent or a "third party". Then, on November 25, 1983, respondent stated that "No loss of custody by the mother or of contact with the stepfather is, of course, at issue" (Br. in Opp. pp. 20,21). Petitioner respectfully submits that this statement to the United States Supreme Court is at best falsity and at worst perjury.

In this questionable statement, the word "stepfather" refers to the present husband of the petitioner, who has stated under oath that he is the child's natural father.

8. Respondent claims that petitioner has not raised federal questions in the Oklahoma Courts. Petitioner claimed equal protection of the laws in her petition for certiorari to the Oklahoma Supreme Court, a petition which was denied by a six to three majority.

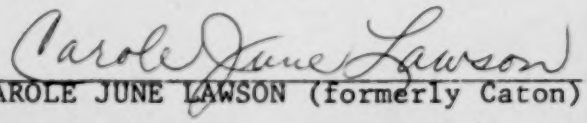
Petitioner's entire course of proceedings beyond the District Court has been a quest for

due process. Whether explicit or implicit, the due process question has been continually before the higher state courts.

CONCLUSION

For reasons given above and in the petition, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,



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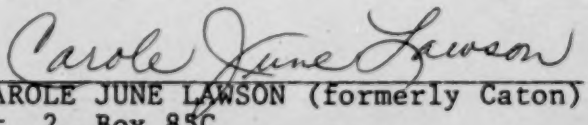

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